

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL DENTON,

Plaintiff,

v.

TIM THRASHER, et al.,

Defendants.

CASE NO. C18-5017 BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION IN
PART, REQUESTING
SUPPLEMENTAL BRIEFS, AND
RENOTING PLAINTIFF'S
OBJECTIONS

This matter comes before the Court on the Report and Recommendation ("R&R") of the Honorable David W. Christel, United States Magistrate Judge, Dkt.137, and Plaintiff Michael Denton's ("Denton") objections to the R&R, Dkt. 138.

On March 20, 2020, Judge Christel issued the R&R recommending that the Court grant Defendants Daniel Bayer, Jaime Davis, William Fletcher, Keith Goodenough, Lindsey McIntyre, David McKinney, Sheldon Moore, Officer O'Reilly, Karie Rainer, Scott Russell, Richard Scholl, and Tim Thrasher's ("Defendants") motion for summary judgment and deny Denton's motion for summary judgment. Dkt. 137. On April 3,

1 2020, Denton filed objections. Dkt. 138. On April 9, 2020, Defendants responded. Dkt.
2 139.

3 The district judge must determine de novo any part of the magistrate judge's
4 disposition that has been properly objected to. The district judge may accept, reject, or
5 modify the recommended disposition; receive further evidence; or return the matter to the
6 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

7 **A. Exhaustion**

8 The R&R recommends that the Court conclude that Denton failed to exhaust his
9 administrative remedies by completing the multi-stage grievance process implemented by
10 the Washington Department of Corrections ("DOC"). Dkt. 137 at 13–17. It is
11 undisputed that DOC officer Morris transcribed Denton's grievance because Denton was
12 placed in a restraint bed and was not allowed pen or paper. Dkt. 98-1. Officer Morris
13 transcribed the grievance on January 1, 2018 and DOC officially received it on January 2,
14 2018. *Id.* The grievance indicates that DOC official Walker considered the grievance
15 routine instead of emergency and requested additional information on January 9, 2018.
16 *Id.* Denton declares that he never received a response to this grievance or the request to
17 rewrite it. Dkt. 127, ¶ 26. The grievance indicates that no rewrite was received as of
18 January 17, 2018. Dkt. 98-1. DOC employee Rebecca Citrak declares that the grievance
19 was then closed. Dkt. 98, ¶ 8.

20 Denton objects to the R&R's conclusion on this issue. The Court agrees with
21 Denton because at the very least a question of fact exists as to whether Denton received
22 any response. "Delay in responding to a grievance, particularly a time-sensitive one, may

1 demonstrate that no administrative process is in fact available.” *Brown v. Valoff*, 422
2 F.3d 926, 943 n.18 (9th Cir. 2005); *see also Jernigan v. Stuchell*, 304 F.3d 1030, 1032
3 (10th Cir. 2002) (“*Jernigan*”) (“[F]ailure to respond to a grievance within the time limits
4 contained in the grievance policy renders an administrative remedy unavailable”); *Foulk*
5 *v. Charrier*, 262 F.3d 687, 698 (8th Cir. 2001) (affirming district court decision not to
6 dismiss for failure to exhaust when a Department of Corrections’ failure to respond to a
7 preliminary grievance precluded the plaintiff from pursuing a formal grievance). Here,
8 taking the facts in the light most favorable to Denton, he has submitted evidence showing
9 that he did not receive a response in the time limits contained in the grievance policy and
10 that his grievance was closed for failure to respond. Thus, it appears that a question of
11 fact exists regarding exhaustion.

12 The R&R and Defendants place the burden on Denton for failing to file another
13 grievance within the administrative time limits. Dkt. 137 at 16; Dkt. 139 at 2–3. The
14 problem with this argument is that there is nothing in the record to establish that Denton
15 could have filed an appeal of his grievance after a certain time period. While DOC
16 employee Citrak describes certain aspects of the DOC’s grievance policy, she fails to
17 explain whether a grievance that has been closed for failure to rewrite may be appealed.¹
18 In *Jernigan*, the court concluded that even though the prison official failed to timely
19 return the inmate’s grievance, the inmate failed to exhaust because he could have

21 ¹ In a previous case, the DOC’s position was that such grievances may not be appealed. *See*
22 *Richey v. Dahne*, C12-5060-BHS, Dkt. 15 at 5 (W.D. Wash. 2012) (“On December 23, 2011, the Acting
Grievance Program Manager, Kerri S. McTarsney, responded to Mr. Richey by reminding him that
requests for rewrites cannot be appealed . . .”).

1 appealed the grievance when the time for a response lapsed. Therefore, before the Court
2 moves to the merits of the events set forth in the grievance, the Court requests additional
3 briefing on whether Denton could have appealed the allegedly unreturned grievance.

4 **B. Other Claims**

5 Judge Christel recommends that the Court grant Defendants' motion for summary
6 judgment on Denton's other Eighth Amendment claims and Americans with Disabilities
7 Act ("ADA") and Rehabilitation Act ("RA") claims. Dkt. 137 at 18–38. Although
8 Denton objects to these conclusions, he fails to cure the major deficiencies in his claims.
9 First, he fails to establish personal participation by any named defendants. While his
10 allegations are troubling, it is improper to indict the DOC in general or unnamed DOC
11 employees. Moreover, for his ADA and RA claims, he fails to establish discrimination
12 because of his disability as opposed to an alleged failure to provide adequate mental
13 health treatment at the institutions of incarceration.

14 Therefore, the Court having considered the R&R, Denton's objections, and the
15 remaining record, does hereby find and order as follows:

- 16 (1) The R&R is **ADOPTED in part**;
- 17 (2) Defendants' motion for summary judgment is **GRANTED in part** and
18 Denton's motion for summary judgment is **DENIED in part**;
- 19 (3) Defendants may file a supplemental response to the exhaustion issue no
20 later than July 7, 2020, and Denton may file a supplemental reply no later
21 than July 10, 2020; and
22

1 (4) The Clerk shall terminate the R&R, Dkt. 137, and renote Denton's
2 objections for consideration on the Court's July 10, 2020 calendar.

3 Dated this 29th day of June, 2020.

4 

5
6 BENJAMIN H. SETTLE
United States District Judge